

2019

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Recommended Citation

Johnsen, Dawn E., "Toward Restoring Rule-of-Law Norms" (2019). *Articles by Maurer Faculty*. 2777.
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Toward Restoring Rule-of-Law Norms

Dawn Johnsen *

President Donald Trump's flagrant and frequent violations of fundamental norms of presidential behavior undermine our constitutional democracy. They test the ability of long-standing existing systems and institutions to sustain the rule of law, to protect fundamental rights and values, and to check presidential wrongdoing.

This Article is part of a symposium that addresses the pressing need for "Reclaiming—and Restoring—Constitutional Norms." As that title implies, it will take more than simply electing different and better presidents to rectify harms President Trump has inflicted and fault lines he has revealed. One important lesson evident from life during the Trump Administration is the enormous difficulty and necessity of protecting valuable norms from a president who is deeply disdainful of government, the Constitution, and the rule of law. Constitutional norms can and should be made more secure through a variety of efforts that relate to the many foundational institutions that have been targets of Trump's disdain: the federal judiciary, Executive Branch (including law enforcement) officials, Congress, the press, states and cities, advocacy and professional organizations, and the legal academy and universities.¹

This Article considers the first two of these key institutions—the federal courts and the Executive Branch—and some common misperceptions about their relative roles that threaten to impede the restoration of constitutional norms. In particular, this Article highlights two types of false equivalencies common in public discourse that cloud popular understandings and obfuscate the depths and dangers of President Trump's wrongdoing.

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1. President Trump has engaged in a range of assaults on these foundational institutions, from repeatedly calling the press "the true Enemy of the People," Donald J. Trump (@realDonaldTrump), TWITTER (Oct. 29, 2018), <https://twitter.com/realdonaldtrump/status/1056879122348195841?lang=en> [<https://perma.cc/9NP3-HVM7>], to undermining law enforcement investigations into his own wrongdoing while calling for criminal prosecutions of those he considers his political adversaries. Kyle Swenson, *The Ever-Growing List of People Donald Trump Says Should Be Jailed*, WASH. POST (Nov. 29, 2018), https://www.washingtonpost.com/nation/2018/11/29/an-incomplete-list-all-people-donald-trump-has-said-should-be-jailed/?utm_term=.f499ad122d73 [<https://perma.cc/2272-GETX>]. During his campaign, Trump's disdain for the law went as far as colorfully declaring that he could get away with murder: "I could stand in the middle of 5th Avenue and shoot somebody and I wouldn't lose any voters." CNN, *Trump: I Could Shoot Somebody and Not Lose Voters*, YOUTUBE (Jan. 23, 2016), <https://www.youtube.com/watch?v=iTACH1eVlaA> [<https://perma.cc/G64B-3TUN>]. This Article takes the existence of President Trump's serious norm violations as a given and, rather than detail and document examples, moves directly to the Symposium's call for solutions: What can and should be done to the end of "Reclaiming—and Restoring—Constitutional Norms"?

First, we tend to equate presidential wrongdoing with what the courts, and especially the Supreme Court, ultimately will declare to be unlawful. Witness, for example, in the face of daily news stories regarding President Trump's connections to various wrongs and controversies, the excessively narrow focus on what the courts or a special prosecutor might do. Whether, for example, a sitting president can be indicted, prosecuted, and convicted. Or whether a court will declare President Trump's financial holdings (which undoubtedly present deeply troubling conflicts of interests in the ordinary sense of that term) a violation of the Emoluments Clause or any other conflict-of-interest law. Or whether any of a range of dubious financial transactions and asset evaluations constitute a provable crime. Or whether President Trump or anyone connected with his campaign colluded with Russia to influence the outcome of his presidential race. Or President Trump's legal status as an unindicted coconspirator or defendant (while in or out of office).

This judicial focus, although understandable at one level, is grossly disproportionate to the norms that ordinarily guide and constrain presidents. The absence of a court ruling condemning a presidential action is, to be sure, a notable fact, but it is far from a vindication of the President's behavior. Courts on many occasions decline or fail to enforce the constitutional and other legal responsibilities that presidents take an oath to uphold. Even absent the possibility of meaningful judicial review, presidential action contrary to those responsibilities may be unconstitutional or wrong. A multitude of judicial doctrines prevent the courts from fully assessing presidential wrongdoing, among them: judicial deference to the President, the lack of a plaintiff with standing, judicial refusal to address "political questions," and a variety of privileges. Professor Steven Vladeck, for example, has enumerated twelve doctrines of judicial deference and restraint that the U.S. Department of Justice asserted to defend against civil suits by individuals who suffered torture and other serious harm during the Bush Administration.² Given the current makeup of the Supreme Court, the gap between wrongful presidential behavior and what the Supreme Court will declare unlawful is likely to grow.

Second, we tend to exaggerate and mischaracterize ostensible similarities in presidential misbehavior, improperly equating actions of different presidents. Although this is not a new phenomenon, Trump's extraordinary misconduct has contributed to growing cynicism and diminishing expectations that can be norm corroding. Take, for example, the commonly expressed view that presidents, as a rule, have embraced expansive conceptions of executive power to the detriment of congressional powers, especially with regard to war powers and national security.³ Or that

2. Stephen I. Vladeck, *The Demise of Merits-Based Adjudication in Post-9/11 National Security Litigation*, 64 *DRAKE L. REV.* 1035, 1040–41 (2016).

3. For a discussion of one prominent example—that is, the frequent mistaken equating of the

all presidents lie to the American public. Despite elements of truth, both statements overgeneralize in ways that can undermine the very norms we must seek to reclaim and restore. For example, notwithstanding the fact that previous presidents have claimed excessive powers and lied to the public, President Trump in unprecedented ways has violated constitutional norms core to our democratic system with sweeping claims of above-the-law authorities and 10,111 false or misleading claims made during 828 days in office, according to The Washington Post's ongoing count.⁴

Special Counsel Robert Mueller's investigation into Russian interference with the 2016 election presents a prominent context in which such false equivalencies have distorted public understandings.⁵ President Trump personally led efforts to frame the investigation in terms of criminal culpability, with a drumbeat of "No Collusion" and "No Obstruction" throughout the investigation and upon release of the redacted report.⁶ Trump's supporters unsurprisingly followed his lead, but the media also has focused disproportionately through the lens of potential criminality—and even through that lens, has failed adequately to appreciate that Mueller did not find Trump's actions to be lawful.⁷ On the issue of obstruction of justice, Mueller could not have been clearer about that fact. His analysis opens by emphasizing that, because a sitting President cannot be indicted or prosecuted, he did not undertake a "traditional prosecutorial judgment" or an approach that could lead to a judgment that the President had acted unlawfully.⁸ His introduction also emphasizes that he was unable to conclude

actions and views of Presidents George W. Bush and Barack Obama with regard to presidential power—see Dawn Johnsen, *The Lawyers' War: Counterterrorism from Bush to Obama to Trump*, FOREIGN AFF., Jan./Feb. 2017, at 148, 151–53. For an exhaustive and insightful review of presidential assertions of preclusive Commander in Chief authority to disregard federal statutory restrictions on presidential war powers, see David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb—A Constitutional History*, 121 HARV. L. REV. 941, 944 (2008); David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb—Framing the Problem, Doctrine, and Original Understanding*, 121 HARV. L. REV. 689, 704–11 (2008).

4. Glenn Kessler et al., *President Trump Has Made More than 10,000 False or Misleading Claims*, WASH. POST (Apr. 29, 2019), https://www.washingtonpost.com/politics/2019/04/29/president-trump-has-made-more-than-false-or-misleading-claims/?utm_term=.4860a107eae9 [<https://perma.cc/J8BJ-9B32>].

5. 1 ROBERT S. MUELLER, III, U.S. DEP'T OF JUSTICE, REPORT ON THE INVESTIGATION INTO RUSSIAN INTERFERENCE IN THE 2016 PRESIDENTIAL ELECTION (2019); 2 ROBERT S. MUELLER, III, U.S. DEP'T OF JUSTICE, REPORT ON THE INVESTIGATION INTO RUSSIAN INTERFERENCE IN THE 2016 PRESIDENTIAL ELECTION (2019).

6. E.g., Donald J. Trump (@realDonaldTrump), TWITTER (Apr. 18, 2018, 5:54 PM), <https://twitter.com/realdonaldtrump/status/1118860425599307777> [<https://perma.cc/3ZAY-VL59>].

7. See, e.g., Tamara Keith, *Mueller Report Still Attracts Attention from Both Sides of the Aisle*, NPR (Apr. 22, 2019), <https://www.npr.org/2019/04/22/715875239/mueller-report-still-attracts-attention-from-both-sides-of-the-aisle> [<https://perma.cc/BCU5-K6G5>] (discussing prioritization of the law over morality and ethics).

8. 2 MUELLER, *supra* note 5, at 1–2.

that the President was not guilty of obstruction of justice, as well as the importance of preserving evidence because a president may be prosecuted after he leaves office.⁹

As this Article goes to print, reactions and responses to the extraordinary Mueller investigation remain ongoing. An example more typically illustrative of the dangers of false equivalencies and faulty understandings related to preserving the rule of law can be found in President Trump's actions to bar nationals from designated foreign countries from entering the United States, commonly described as the "Travel Ban."¹⁰ Legal challenges to Trump's Travel Ban argued, among other things, that it unconstitutionally targeted predominantly Muslim countries in violation of the First Amendment's prohibition on discrimination on the basis of religion.¹¹ News reports of the Supreme Court's ruling in *Trump v. Hawaii*¹² typically mischaracterized the Court's decision as upholding the constitutionality of the Travel Ban.¹³

Some, though far from all, reports noted the Travel Ban's complicated history. This includes its origins in Trump's campaign speeches and its evolution through three presidential orders, such that the version of the Travel Ban before the Supreme Court differed significantly from how Trump initially formulated the Ban¹⁴—and continued to wish he could formulate the Ban.¹⁵ Losses in the lower federal courts prompted his Administration to make significant revisions to disguise the extent of the Ban's anti-Muslim focus.¹⁶ Absent those changes, the Supreme Court almost certainly would have affirmed the lower courts and enjoined the Ban.

More to this Article's point, the overwhelming weight of press coverage and commentary mischaracterized the Court's ruling as upholding the legality of the third version of the Travel Ban. The thrust of headlines and reports, and thus public understanding, fell in line with President Trump's

9. *Id.*

10. President Trump actually issued three versions of the Travel Ban. Proclamation No. 9645, 82 Fed. Reg. 45,161 (Sept. 27, 2017); Exec. Order No. 13,780, 82 Fed. Reg. 13,209 (Mar. 9, 2017); Exec. Order No. 13,769, 82 Fed. Reg. 8977 (Feb. 1, 2017).

11. *Trump v. Hawaii*, 138 S. Ct. 2392, 2416–17 (2018).

12. 138 S. Ct. 2392 (2018).

13. *E.g.*, Tucker Higgins, *Supreme Court Rules that Trump's Travel Ban Is Constitutional*, CNBC (June 26, 2018), <https://www.cnbc.com/2018/06/26/supreme-court-rules-in-trump-muslim-travel-ban-case.html> [https://perma.cc/LA3X-NQJ5]; *see also* Marty Lederman, *Contrary to Popular Belief, the Court Did Not Hold that the Travel Ban Is Lawful—Anything But*, JUST SECURITY (July 2, 2018), <https://www.justsecurity.org/58807/contrary-popular-belief-court-hold-travel-ban-lawful-anything-but-which-ruling-justice-kennedys-deference-presidents-enforcement-ban-indefensible/> [https://perma.cc/VSU3-3S5P] (citing examples).

14. *See supra* note 10; Higgins, *supra* note 13.

15. *See, e.g.*, *Trump*, 138 S. Ct. at 2438 (Sotomayor, J., dissenting) (quoting President Trump's tweet: "[t]he travel ban into the United States should be far larger, tougher and more specific—but stupidly, that would not be politically correct!").

16. *Id.* at 2403–06.

own immediate tweet declaring complete victory: “SUPREME COURT UPHOLDS TRUMP TRAVEL BAN. Wow!”¹⁷

In fact, not a single Supreme Court Justice opined that the Travel Ban was constitutional. That’s worth repeating: *not a single Supreme Court Justice opined that the Travel Ban was constitutional*. Professor Marty Lederman put it well in an online post several days after the ruling: “Contrary to Popular Belief, the Court Did Not Hold that the Travel Ban Is Lawful—Anything But.”¹⁸

The issue on which the Justices divided sharply was the lower court’s grant of a nationwide preliminary injunction to prevent enforcement of the Travel Ban during the course of litigation. Four dissenting Justices found that the plaintiffs were likely to prevail on their theory that President Trump was motivated in issuing the Travel Ban by anti-Muslim religious animus in violation of the First Amendment.¹⁹ For that reason, they would have upheld the preliminary injunction and remanded the case. The Court’s opinion for the five-Justice majority emphasized that, notwithstanding evidence of religious discrimination behind the neutral words of the President’s Proclamation, it had concluded that the appropriate standard of judicial review was the highly deferential rational basis review standard.²⁰ Rather than closely scrutinizing the President’s action in light of the evidence of discriminatory motivation, the Court held that it would consider the question only behind a veil of deference to the President—and that the plaintiffs had not demonstrated a likelihood of success on the merits (necessary to justify a preliminary injunction) given that the President’s national-security rationale sufficed to survive that minimal review.²¹

17. Donald J. Trump (@realDonaldTrump), TWITTER (June 26, 2018, 8:40 AM), <https://twitter.com/realDonaldTrump/status/1011620271327989760> [<https://perma.cc/SBW8-RXEG>].

18. Lederman, *supra* note 13.

19. Justice Sonia Sotomayor’s dissent (joined by Justice Ruth Bader Ginsburg) made a detailed and compelling case that “a reasonable observer would conclude that the Proclamation was driven primarily by anti-Muslim animus” and therefore the plaintiffs were likely to succeed on their claim that the Travel Ban violated the First Amendment. *Trump*, 138 S. Ct. at 2438 (Sotomayor, J., dissenting). Justice Stephen Breyer’s dissent (joined by Justice Elena Kagan) called for the further development on remand of the record of exemptions and waivers, during which the preliminary injunction would remain in effect, but he concluded by agreeing with Justice Sotomayor’s dissent:

If this Court must decide the question without this further litigation, I would, on balance, find the evidence of antireligious bias, including statements on a website taken down only after the President issued the two executive orders preceding the Proclamation, along with the other statements also set forth in Justice Sotomayor’s opinion, a sufficient basis to set the Proclamation aside.

Id. at 2433 (Breyer, J., dissenting).

20. *Id.* at 2418, 2420, 2423.

21. The Court also noted that the relevant statutory source of the President’s authority, the Immigration and Nationality Act, “exudes deference to the President in every clause.” *Id.* at 2408.

Justice Anthony Kennedy, who provided a necessary fifth vote for the Court's ruling and Chief Justice John Robert's majority opinion, issued an important concurrence in which, far from blessing the Travel Ban's legality, he revealed concern that it actually had been motivated by unconstitutional animus.²² Kennedy wrote separately to emphasize the limited role of the Court in reviewing presidential actions such as the Travel Ban. His short opinion constitutes a clear caution *against* construing the Court's decision not to enjoin the Travel Ban as President Trump would go on to misconstrue it: as a validation of the President's action. To the contrary, Justice Kennedy admonished that in such instances of "broad discretion, discretion free from judicial scrutiny," the President and other Executive Branch officials bear a special responsibility to adhere to "the Constitution and the rights it proclaims and protects" and "its meaning and its promise."²³ Justice Kennedy's short concurrence merits an extensive quotation:

There are numerous instances in which the statements and actions of Government officials are not subject to judicial scrutiny or intervention. That does not mean those officials are free to disregard the Constitution and the rights it proclaims and protects. The oath that all officials take to adhere to the Constitution is not confined to those spheres in which the Judiciary can correct or even comment upon what those officials say or do. Indeed, the very fact that an official may have broad discretion, discretion free from judicial scrutiny, makes it all the more imperative for him or her to adhere to the Constitution and to its meaning and its promise.

The First Amendment prohibits the establishment of religion and promises the free exercise of religion. From these safeguards, and from the guarantee of freedom of speech, it follows there is freedom of belief and expression. It is an urgent necessity that officials adhere to these constitutional guarantees and mandates in all their actions, even in the sphere of foreign affairs. An anxious world must know that our Government remains committed always to the liberties the Constitution seeks to preserve and protect, so that freedom extends outward, and lasts.²⁴

Given Justice Kennedy's compelling analysis of the harm inflicted when religious animus infects governmental action, it is perhaps surprising (and in my view, disappointing and wrong) that he did not join the dissenting Justices in concluding that the Court's proper role demanded a more searching scrutiny of the Travel Ban's constitutionality and that the plaintiffs were likely to prevail. Nonetheless, Justice Kennedy did signal the terrible wrong of religious discrimination in selectively denying Muslims entry to the United

22. *Id.* at 2423–24 (Kennedy, J., concurring).

23. *Id.* at 2424.

24. *Id.*

national counterparts a run for their money. State-government officials in multiple states have engaged in high-stakes “power plays.”³ Some have been high profile: legislatures in North Carolina, Wisconsin, and Michigan have used lame-duck sessions to dramatically limit the power of incoming governors and attorneys general, or to attempt to do so.⁴ Similar events in other states have received less attention: the Minnesota Governor zeroed out the operating budget of the state legislature, for example, and the West Virginia legislature impeached all members of its supreme court.⁵ These developments have in common a willingness by state officials to alter or strain the institutions of state government—the so-called “rules of the game”⁶—for short-term political advantage. If the national branches are playing constitutional hardball, the states are playing hand grenades.

Much of the reaction to these developments has, understandably, engaged them through the lens of political theory. Scholars and journalists have opined that these hardball tactics bespeak democracy in crisis.⁷ Others have suggested policy platforms that Democrats should propose in reaction to the (largely, but not exclusively) Republican maneuvers.⁸ Some scholars

branch in the views of the other and that (3) creates a constitutional precedent”).

3. See *infra* subpart I(A) (defining power plays). A number of recent news articles have used this label, although not in precisely the way I do here. See, e.g., Jonathan Oosting, *Snyder the Wild Card in Michigan GOP's Lame-Duck Power Play*, DETROIT NEWS (Dec. 14, 2018, 5:51 AM), <https://www.detroitnews.com/story/news/politics/2018/12/14/snyder-michigan-republican-power-play/2292140002/> [<https://perma.cc/BSD2-JT64>]; Mitch Smith et al., *Behind the Scenes in Wisconsin: A Republican Power Play, Months in the Making*, N.Y. TIMES (Dec. 7, 2018), <https://www.nytimes.com/2018/12/07/us/wisconsin-republicans-power.html> [<https://perma.cc/38K5-6CNL>].

4. Richard Fausset, *North Carolina Governor Signs Law Limiting Successor's Power*, N.Y. TIMES (Dec. 16, 2016), <https://www.nytimes.com/2016/12/16/us/politics/pat-mccrory-roy-cooper-north-carolina.html> [<https://perma.cc/7ED8-TRJB>]; Kathleen Gray, *Snyder Tackles Most Controversial Lame-Duck Bills Passed by Lawmakers*, DETROIT FREE PRESS (Dec. 29, 2018, 6:00 AM), <https://www.freep.com/story/news/politics/2018/12/29/snyder-signs-vetoes-lame-duck-bills/2436679002/> [<https://perma.cc/BLZ4-9GEH>]; Patrick Marley et al., *Scott Walker Signs Lame-Duck Legislation Without Vetoes Curbing His Democratic Successor's Power*, MILWAUKEE J. SENTINEL (Jan. 21, 2019, 6:05 PM), <https://www.jsonline.com/story/news/politics/2018/12/14/scott-walker-signs-lame-duck-bill-curbing-powers-his-successor/2238900002/> [<https://perma.cc/F3Z8-BYAV>].

5. See *infra* subsection I(A)(1)(c).

6. Daryl J. Levinson, *Parchment and Politics: The Positive Puzzle of Constitutional Commitment*, 124 HARV. L. REV. 657, 681 (2011) (quoting DOUGLASS C. NORTH, INSTITUTIONS, INSTITUTIONAL CHANGE AND ECONOMIC PERFORMANCE 3 (1990)).

7. See, e.g., Jedediah Purdy, *North Carolina's Partisan Crisis*, NEW YORKER (Dec. 20, 2016), <https://www.newyorker.com/news/news-desk/north-carolinas-partisan-crisis> [<https://perma.cc/YAA2-ZL6Z>].

8. See Jacob T. Levy, *The Democrats' Best Response to Republican Power Grabs*, N.Y. TIMES (Dec. 11, 2018), <https://www.nytimes.com/2018/12/11/opinion/wisconsin-michigan-democrats-hardball.html> [<https://perma.cc/CWZ8-BU25>] (discussing reforms Democrats should urge in response to Republican maneuvers). On the partisan asymmetry, see Fishkin & Pozen, *supra* note 2, at 936–37.

have noted that, while the broader pattern is “potentially insidious,” it bears remembering that “[p]ressing the rules for full partisan advantage has long been part of democracy.”⁹

This Essay urges consideration of another dimension of the recent power plays: they present important, justiciable questions of state constitutional law. Indeed, the lack of academic commentary on the legal aspects of state power plays belies a growing body of case law in state courts. This Essay’s descriptive aim is to shine light on how power plays are unfolding in these state laboratories. It explores eight power plays in seven states over the past two years and describes how state courts are deciding the resulting cases. State legislatures, governors, and arguably courts have engaged in power plays, and their moves have implicated state constitutional clauses regarding the separation of powers, the governors’ executive power, and the protocols for electing or appointing state officials, among others. Some power plays are clear constitutional violations, while others occupy gray areas. State-court decisions on these matters have ranged from ordering the political branches to mediation to reaching broad constitutional rulings, and several variants in between.

Yet some state judges, both in majority and dissent, have worried that power plays are “ill-suited for judicial resolution.”¹⁰ And litigants on the losing side of the ensuing cases may have questions about whether the litigation was appropriate or wise. These concerns and others might cause one to wonder: is it a mistake for state courts to decide the fate of power plays or for litigants to call upon them to do so?

It is too early to provide a full normative response; the developments discussed herein are still unfolding. Surely power play litigation will implicate costs as well as benefits, and for many stakeholders, the result of any given case is what will matter most. In this Essay, prepared for a symposium on “Reclaiming—and Restoring—Constitutional Norms,” I focus on a set of more systemic potential benefits of power play litigation that have special application at the state level. Power play litigation is dialogue-forcing in a state realm that needs dialogue. Whereas state constitutions sometimes seem forgotten, adjudicating power plays may bring state constitutions more squarely onto the radar of state officials and communities, and foster deliberation and dialogue about state government in

9. Matt Glassman, *Republicans in Wisconsin and Michigan Want to Weaken Incoming Democratic Governors. Here’s What’s the Usual Partisan Politics—and What Isn’t*, WASH. POST: MONKEY CAGE (Dec. 11, 2018), https://www.washingtonpost.com/news/monkey-cage/wp/2018/12/11/wisconsins-and-michigans-legislatures-are-trying-to-weaken-incoming-governors-should-you-be-worried/?utm_term=.f22294d76b6a [<https://perma.cc/WK8L-WM2K>].

10. *Ninetieth Minn. State Senate v. Dayton*, 903 N.W.2d 609, 623 (Minn. 2017); *Cooper v. Berger*, 809 S.E.2d 98, 127 (N.C. 2018) (Newby, J., dissenting) (arguing that the controversy was a “nonjusticiable political question”).

a legal register rather than an exclusively political one. In addition, insofar as power play lawsuits involve actors who were otherwise not involved in the decision at hand—litigants, civil-society groups, and judges—adjudication of power plays also serves the separation-of-powers value of bringing varied constituencies into the mix of state decision-making.¹¹

The Essay proceeds as follows. Part I elaborates on the definition of power plays, catalogs recent examples, and identifies common features of both the power plays and ensuing judicial decisions. The goal is to frame power plays as a class of cases that can be the subject of continued study. Part II discusses deliberation-forcing benefits of power play litigation that have special application at the state level. This Part's aim is to surface a systemic benefit that might be overlooked by those viewing these cases individually, rather than to try to cash out these benefits against countervailing costs. A conclusion observes that extant state adjudications provide only incremental interventions against power plays and raises questions for future work regarding the possibility of other approaches.

I. State Power Plays and Their Drivers

Bitter state politics are not brand new,¹² but recent accounts have depicted state governments as less prone to the bitter interbranch squabbles that have plagued national politics.¹³ State officials have underscored, as a

11. See Victoria Nourse, *The Vertical Separation of Powers*, 49 DUKE L.J. 749, 752 (1999) (articulating a concept of the separation of powers in which “every shift in governmental function or task can be reconceived, not simply as a shift in tasks but also as a shift in the relative power of popular constituencies”); Josh Chafetz, *Multiplicity in Federalism and the Separation of Powers*, 120 YALE L.J. 1084, 1122 (2011) (book review) (describing the value of “multiplicity” as an important feature of the separation of powers).

12. Dramatic intragovernmental conflicts occurred in the nineteenth century. Bitter feuds led to two competing Supreme Courts in Kentucky, see LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* 151–52 (2004), and various legislative “attacks” on state judiciaries occurred during the Jeffersonian and Jacksonian periods, JED HANDELSMAN SHUGERMAN, *THE PEOPLE’S COURTS: PURSUING JUDICIAL INDEPENDENCE IN AMERICA* 49–56 (2012) (describing these conflicts). Rhode Island’s Dorr War, a constitutional crisis in which the state temporarily had two competing governments, provides an extreme example. See generally GEORGE M. DENNISON, *THE DORR WAR* (1976) (providing a history). Even in recent years, there have been instances of officials revising the rules of the game for political advantage. See *Don’t Let Senate Seat Be Vacant*, BOSTON.COM: BOS. GLOBE (Aug. 21, 2009), http://archive.boston.com/bostonglobe/editorial_opinion/editorials/articles/2009/08/21/dont_let_senate_seat_be_vacant/ [<https://perma.cc/P9JV-DY8U>] (describing the Democratic Massachusetts legislature’s 2004 divestment of then-Governor Mitt Romney’s power to make appointments for vacant U.S. Senate seats); Glassman, *supra* note 9 (describing actions by North Carolina and Alabama to limit the powers of their Lieutenant Governors).

13. See, e.g., NAT’L CONFERENCE OF STATE LEGISLATORS, *STATE LEGISLATIVE POLICYMAKING IN AN AGE OF POLITICAL POLARIZATION* 21 (2017) [hereinafter NCSL REPORT]; Margaret H. Lemos & Ernest A. Young, *State Public-Law Litigation in an Age of Polarization*, 97 TEXAS L. REV. 43, 55–56 (2018).

point of pride, that they are “not D.C.”¹⁴ and have often steered clear of dysfunction.¹⁵ Is something changing?

Political scientists and legal scholars alike have exhaustively documented the rise of polarization and related phenomena nationally. Here, I will simply draw out a few factors important to the power plays I describe. First, political parties in many states are both highly polarized, meaning that median legislators from each party are ideologically far apart,¹⁶ and well sorted, meaning that each party has a relatively consistent ideology.¹⁷ Furthermore, scholars have chronicled the rise of “partisan warfare”¹⁸: intense competition and animosity between the parties that seem particularly palpable in power plays.¹⁹ In North Carolina, for example, political insiders

14. NCSL REPORT, *supra* note 13, at 17.

15. For an account of this outlook—and its demise—in Texas, see Lawrence Wright, *America's Future Is Texas*, NEW YORKER (July 10, 2017), <https://www.newyorker.com/magazine/2017/07/10/americas-future-is-texas> [<https://perma.cc/G8TS-EEUN>] (“While George W. Bush was governor [of Texas], between 1995 and 2000, a cordial détente between the political parties prevailed. The lieutenant governor, Bob Bullock, and Speaker Laney were both Democrats, and, when Bush ran for President, they became exhibits in his argument that he would be a bipartisan leader.”). By 2003, the Democrats were repeatedly decamping out of state to avoid a redistricting vote. *Id.*

16. Boris Shor and his colleagues have documented these trends extensively, beginning with Boris Shor & Nolan McCarty, *The Ideological Mapping of State Legislatures*, 105 AM. POL. SCI. REV. 530, 531, 546 (2011). Data updates are available on their website, Boris Shor & Nolan McCarty, *Data*, MEASURING AM. LEGISLATURES, <http://americanlegislatures.com/data> [<https://perma.cc/PC5E-NTAT>] (last updated May 2018). For an accessible primer, see Boris Shor, *How U.S. State Legislatures Are Polarized and Getting More Polarized (in 2 Graphs)*, WASH. POST: MONKEY CAGE (Jan. 14, 2014), <https://www.washingtonpost.com/news/monkey-cage/wp/2014/01/14/how-u-s-state-legislatures-are-polarized-and-getting-more-polarized-in-2-graphs/> [<https://perma.cc/69FN-8843>]. In roughly half the states, polarization is higher than in Congress, which, as the leading study's author put it, “is saying a lot.” *Id.*

17. See MATTHEW LEVENDUSKY, *THE PARTISAN SORT: HOW LIBERALS BECAME DEMOCRATS AND CONSERVATIVES BECAME REPUBLICANS* 4–5, 8 (2009) (discussing the modern alignment of party and ideology in American politics and the impact on voters' attitudes and behaviors); Gerald C. Wright & Nathaniel Birkhead, *The Macro Sort of the State Electorates*, 67 POL. RES. Q. 426, 427 (2014) (describing the change “from the chaotic relationship between state partisanship and ideology of the 1970s and 1980s to the much greater alignment of 2000 and beyond”). As Morris Fiorina puts it, “If you are a conservative (liberal), there used to be people like you in the other party, so the other party wasn't all bad. Now it is.” Morris Fiorina, *Americans Have Not Become More Politically Polarized*, WASH. POST: MONKEY CAGE (June 23, 2014), <https://www.washingtonpost.com/news/monkey-cage/wp/2014/06/23/americans-have-not-become-more-politically-polarized/> [<https://perma.cc/R76D-MCAL>]. For a longer treatment, see generally MORRIS P. FIORINA, *UNSTABLE MAJORITIES: POLARIZATION, PARTY SORTING & POLITICAL STALEMATE*, ch. 4 (2017) [hereinafter FIORINA, *UNSTABLE MAJORITIES*], discussing party sorting in American politics.

18. See *supra* note 1.

19. See, e.g., Rick Pearson et al., *Rauner–Madigan War Leads to Exodus of Lawmakers from Springfield*, CHI. TRIB. (Sept. 20, 2017, 5:00 AM), <http://www.chicagotribune.com/news/local/politics/ct-durkin-illinois-general-assembly-turnover-met-0920-20170919-story.html> [<https://perma.cc/N2PV-M4JH>] (describing “the new evolution of partisanship” in which “a willingness to work across the aisle and compromise is viewed as weakness,” and how the

describe the 2016 lame-duck developments as “more polarized and more acrimonious” than they had ever witnessed, even during earlier bitter times.²⁰

The fact that the recent power plays have all occurred in “purple” states—those in which elections tend to be close calls—suggests another contributing factor. When an election is up for grabs, political actors have incentives to engage in fierce, zero-sum, us-versus-them behavior.²¹ State officials may feel they should try to preserve power at all costs rather than losing it to the other side.²² And, as Part II describes further, weak constitutional norms in the states may fail to create counterincentives to the pursuit of political advantage.

The remainder of this Part describes the power plays that have transpired. Subpart I(A) addresses the defining traits of a power play and discusses concerns that power plays raise. Subpart I(B) describes how state courts have reacted to power plays.

A. Definitions and Concerns

This Essay defines power plays as actions that alter or aggressively leverage institutional power and do so for partisan ends, in either of two senses: that the actor would not make the same institutional argument if the parties were reversed,²³ or that the actor is undermining apparent majority

“hyperpartisan era of winner-take-all politics” has prompted many lawmakers to leave the state legislature altogether).

20. Jason Zengerle, *Is North Carolina the Future of American Politics?*, N.Y. TIMES MAG. (June 20, 2017), <https://www.nytimes.com/2017/06/20/magazine/is-north-carolina-the-future-of-american-politics.html> [https://perma.cc/WQ9K-PEWF].

21. See Frances E. Lee, *Legislative Parties in an Era of Alternating Majorities*, in GOVERNING IN A POLARIZED AGE: ELECTIONS, PARTIES, AND POLITICAL REPRESENTATION IN AMERICA 115, 137 (Alan S. Gerber & Eric Schickler eds., 2017).

22. See FIORINA, UNSTABLE MAJORITIES, *supra* note 17, at 106–07 (“Given this uncertainty about the electoral future, you might as well go for broke even if you suffer the consequences in the next election.”). There are other possible explanations. As Richard Primus writes, “Norm shattering is contagious. The more the President does it, visibly, the more other actors in the system will do it, too.” Richard Primus, *The Republic in Long-Term Perspective*, 117 MICH. L. REV. ONLINE 1, 19 (2018), https://repository.law.umich.edu/mlr_online/vol117/iss1/1 [https://perma.cc/V2QN-K978]. So perhaps national hardball feeds state power plays. Another explanation may lie in the increasing connection between state and national policy debates. See DANIEL J. HOPKINS, THE INCREASINGLY UNITED STATES: HOW AND WHY AMERICAN POLITICAL BEHAVIOR NATIONALIZED 42 (2018); Alex Garlick, *National Policies, Agendas, and Polarization in American State Legislatures: 2011 to 2014*, 45 AM. POL. RES. 939, 941–42 (2017) (finding greater polarization on issues with national resonance). This phenomenon, in turn, may impede “meaningful accountability or representation” in state government. David N. Schleicher, *Federalism Is in a Bad State*, HARV. L. REV. BLOG (Oct. 12, 2018), <https://blog.harvardlawreview.org/federalism-is-in-a-bad-state> [https://perma.cc/44RR-AJ6P].

23. Like constitutional hardball (and constitutional showdowns), this category inevitably involves blurry lines. See, e.g., Fishkin & Pozen, *supra* note 2, at 922 (describing constitutional hardball as “necessarily fuzzy at the edges”); Posner & Vermeule, *supra* note 2, at 994 (describing “the idea of a constitutional showdown” as one where “there are many related ideas that share no

preferences for self-entrenching purposes.²⁴ Power plays bear a close family resemblance to the more familiar concept of what legal scholars have termed “constitutional hardball”: practices that flout widely agreed upon constitutional understandings without violating the law outright.²⁵ The Republican-controlled Senate’s refusal to consider President Obama’s nomination of Chief Judge Merrick Garland “stands as a classic example of constitutional hardball.”²⁶ Power plays to date have more commonly entailed both changes to institutional power and actual law breaking, or at least serious constitutional claims, but the two types of conduct are cousins at the least.²⁷

In the past two years, at least eight significant power plays along these lines have occurred in seven states around the country. The remainder of this discussion draws out common themes in these developments. Subpart I(B) then catalogues judicial reactions.

1. *Altering Institutional Power*

a. Legislative Revision: North Carolina, Wisconsin, and Michigan.—One way officials can alter institutional power is through legislation that changes the formal powers of a branch or office. In recent years, the most pronounced examples of this come from the legislative divestment of executive power during lame-duck sessions. In the wake of elections in which members of the opposing party won executive-branch offices, state legislatures in North Carolina, Wisconsin, and Michigan held sessions in which they removed, or attempted to remove, substantial power from newly elected governors and attorneys general.

First, after the 2016 elections in North Carolina, the Republican-controlled legislature in North Carolina made a series of “unusually

single common property or defining feature”).

24. See generally Michael J. Klarman, *Majoritarian Judicial Review: The Entrenchment Problem*, 85 GEO. L.J. 491, 502 (1997) (describing “legislative and cross-temporal varieties” of entrenchment and critiquing them “on majoritarian grounds”).

25. Tushnet, *supra* note 2, at 523; see Fishkin & Pozen, *supra* note 2, at 920–26 (building on this definition).

26. Fishkin & Pozen, *supra* note 2, at 917.

27. See *id.* at 921, 923 (stating that hardball can occur either when a “political maneuver . . . is reasonably viewed by the other side as attempting to shift settled understandings of the Constitution in an unusually aggressive or self-entrenching manner” or when an action “violates or strains constitutional conventions for partisan ends”) (emphases omitted). As noted above, the main difference is the assumption that hardball is not unlawful or justiciable. Two other smaller differences are that power plays always have partisan (rather than institutional) ends and do not involve aggressive *substantive* interpretations, though that line can blur. See *id.* at 921 n.25 (stating that hardball may alternatively “advance the institutional interests of [a] branch or chamber”); Tushnet, *supra* note 2, at 535 (“Political actors can play constitutional hardball with substantive principles.”).

aggressive”²⁸ efforts to limit the power of the newly elected Democratic Governor, Roy Cooper.²⁹ The events began when outgoing Governor Pat McCrory called the legislature into special session to deal with disaster relief.³⁰ But “minutes” after that session concluded, Republican legislative leaders called themselves into an additional special session to begin hours later; as of that time, Democratic legislative leaders reported that they had not been told what the additional session was about.³¹

Within 48 hours, the legislature approved measures that reduced the total number of gubernatorial appointees from 1,500 to 425.³² They also required legislative confirmation for the governor’s cabinet, a move McCrory called “wrong and shortsighted,” but signed into law.³³ In addition, the new laws limited the governor’s power to oversee the state elections board: rather than appointing three members of a five-member board, the governor would now make four appointments of an eight-member board, the legislature would make the other four,³⁴ and Republicans would chair the board in even-numbered (i.e., election) years.³⁵ In addition, the new laws limited the new governor’s role in education: it transferred responsibilities over K–12 education from the governor to the superintendent of public instruction (an office to which a Republican had just been elected) and took away the governor’s appointments to the trustees of the state university system.³⁶

28. Alison Thoet, *What North Carolina’s Power-Stripping Laws Mean for New Gov. Roy Cooper*, PBS: NEWS HOUR (Jan. 3, 2017, 3:57 PM), <https://www.pbs.org/newshour/politics/north-carolinas-power-stripping-laws-mean-new-gov-roy-cooper> [https://perma.cc/KUA9-96T3].

29. See, e.g., Trip Gabriel, *North Carolina G.O.P. Moves to Curb Power of New Democratic Governor*, N.Y. TIMES (Dec. 14, 2016), <https://www.nytimes.com/2016/12/14/us/politics/north-carolina-governor-roy-cooper-republicans.html> [https://perma.cc/F5SQ-2GYU].

30. WBTB et al., *Lawmakers Pass Disaster Relief Fund, Move on to Other Sessions*, WFMY NEWS 2 (Dec. 15, 2016, 10:00 AM), <https://www.wfmynews2.com/article/news/politics/lawmakers-pass-disaster-relief-fund-move-on-to-other-sessions/83-368699104> [https://perma.cc/9UAL-3LMM].

31. *Id.*

32. Craig Jarvis, *McCrory Signs Second Measure Whittling Cooper’s Power*, NEWS & OBSERVER (Dec. 20, 2016, 5:43 PM), <https://www.newsobserver.com/news/politics-government/state-politics/article121885658.html> [https://perma.cc/24ES-FRQF]. The legislature had previously increased the number of appointments for McCrory from 400 to 1,500. David A. Graham, *North Carolina Republicans Try to Curtail the New Democratic Governor’s Power*, ATLANTIC (Dec. 14, 2016), <https://www.theatlantic.com/politics/archive/2016/12/north-carolina-special-session-republicans-roy-cooper/510731/> [https://perma.cc/ML6A-GTNR].

33. Amber Phillips, *North Carolina’s Outgoing GOP Governor Just Stuck It to His Democratic Successor*, WASH. POST: FIX (Dec. 19, 2016), <https://www.washingtonpost.com/news/the-fix/wp/2016/12/19/north-carolinas-outgoing-gop-governor-just-stuck-it-to-his-democratic-successor/> [https://perma.cc/6L2P-QLPW].

34. S.B. 4, 2016 Gen. Assemb., 4th Extra Sess. § 138B-2 (N.C. 2016).

35. See *id.* § 138B-2(f) (“In the odd-numbered year, the chair shall be a member of the political party with the highest number of registered affiliates In the even-numbered year, the chair shall be a member of the political party with the second highest number of registered affiliates”).

36. See H.B. 17, 2016 Gen. Assemb., 4th Extra Sess. §§ 115C-11, 143A-44, 143A-44.3, 115C-

Finally, the laws deprived Cooper of the ability to appoint a majority of members to the state's Industrial Commission, a workers' compensation board, by allowing McCrory to fill existing vacancies and by lengthening one commissioner's term.³⁷ The totality of these changes generated protests and negative media attention, but legislators defended their actions as "majority rule."³⁸

Two years later, Wisconsin and Michigan took a page from North Carolina's "playbook."³⁹ In both states, the Republican party retained its legislative majority in the 2018 elections, but Democrats were elected governor and attorney general.⁴⁰ In fast-moving sessions—Wisconsin's bills, spanning hundreds of pages, were released late on a Friday afternoon and voted on overnight Tuesday⁴¹—the lame-duck legislatures moved to limit executive power.⁴² In Michigan, the most controversial changes to executive power either died in the legislature or were vetoed by the governor. In Wisconsin, after issuing public statements characterizing the laws as neutral, good-government measures, Governor Walker signed the bills into law. (The

75.6 (N.C. 2016) (transferring gubernatorial power over K–12 education to the superintendent of public instruction); *id.* at §§ 116-31, 116-233 (modifying trustee appointments for the state university system).

37. See N.C. S.B. 4 § 99-77 (modifying the terms of the industrial commissioners).

38. Craig Jarvis, *North Carolina Governor Signs Bill Limiting His Successor's Power*, GOVERNING (Dec. 19, 2016, 1:00 PM), <http://www.governing.com/topics/politics/tns-mccrory-cooper-bill.html> [<https://perma.cc/XJ2M-6S6L>].

39. Tara Golshan, *North Carolina Wrote the Playbook Wisconsin and Michigan Are Using to Undermine Democracy*, VOX (Dec. 5, 2018, 1:10 PM), <https://www.vox.com/policy-and-politics/2018/12/5/18125544/north-carolina-power-grab-wisconsin-michigan-lame-duck> [<https://perma.cc/CP3U-E4JT>].

40. Tara Golshan, *Tony Evers Elected Governor of Wisconsin: Democrats Finally Unseat Scott Walker*, VOX (Nov. 7, 2018, 1:41 PM), <https://www.vox.com/2018/11/7/18055426/midterm-election-results-wisconsin-governor-tony-evers-winner> [<https://perma.cc/7UGM-PXMK>]; Kathleen Gray, *Dems Make Gains in Michigan and Congress, But Blue Wave Falls Short*, DETROIT FREE PRESS (Nov. 7, 2018, 6:58 PM), <https://www.freep.com/story/news/politics/elections/2018/11/07/democrats-michigan-house-senate/1835284002/> [<https://perma.cc/TN82-P7VY>]; Maayan Silver, *Policy Changes To Look For With Wisconsin's New Democratic Attorney General*, WUWM 89.7 (Nov. 22, 2018), <https://www.wuwm.com/post/policy-changes-look-wisconsins-new-democratic-attorney-general#stream/0> [<https://perma.cc/Z3AZ-XM3K>].

41. Katelyn Ferral, *What Happened While You Slept: A Guide to Wisconsin's Lame-Duck Legislative Session*, CAP TIMES (Dec. 5, 2018), https://madison.com/ct/news/local/govt-and-politics/what-happened-while-you-slept-a-guide-to-wisconsin-s/article_2b2bb8a3-9166-5ada-9a0a-be3e7deb4486.html [<https://perma.cc/PV2H-KXEN>] (providing a timeline of legislative developments). On Michigan's timing, see Steve Carmody et al., *Bills Continue to Fly Through Lame-Duck Session in Its Final Week*, MICH. RADIO (Dec. 18, 2018), <https://www.michiganradio.org/post/bills-continue-fly-through-lame-duck-session-its-final-week> [<https://perma.cc/ZLQ4-UTY8>].

42. Shawn Johnson & Laurel White, *Wisconsin Legislature Works Overnight to Approve Limiting Gov.-Elect Tony Evers' Power*, WIS. PUB. RADIO (Dec. 5, 2018, 8:40 AM), <https://www.wpr.org/wisconsin-legislature-works-overnight-approve-limiting-gov-elect-tony-evers-power> [<https://perma.cc/5BY5-84EU>].

States and the “urgent necessity” for the President and Executive Branch officials to live up to their constitutional responsibility, whether or not the Court ordered them to do so.²⁵ That constitutional obligation endures, from the first version of the Travel Ban through today.

As was widely publicized, President Trump fired Acting Attorney General Sally Yates during his first month in office after she, exactly consistent with the role outlined by Justice Kennedy, refused to defend the legality of the President’s first Travel Ban.²⁶ Less known was that, in a radical breach of norms, lawyers in the U.S. Department of Justice’s Office of Legal Counsel (OLC), who act by delegated authority and under the supervision of the Attorney General,²⁷ reportedly had been ordered by White House officials to keep secret from Yates that they were reviewing the Travel Ban.²⁸

Fundamentally, a judicial ruling declining to enjoin a presidential action on grounds of deference (as the Court declined with regard to the third Travel Ban) does nothing to diminish the President’s independent constitutional obligation to act lawfully and to “take Care that the Laws be faithfully executed” by Executive Branch officials.²⁹ Contrary to President Trump’s twisted tweet claiming victory, and as Justice Kennedy strongly implied, after the Court’s ruling the President continued to bear the constitutional responsibility to repeal the unlawful Travel Ban—as an “anxious world” continued to watch.³⁰

Instead, President Trump continued to shirk his constitutional responsibilities and falsely claim the imprimatur of the Supreme Court. The saga of the constitutionality of the various Travel Bans is one illustration of the need for an improved shared public understanding of the relative roles of the judiciary and the Executive Branch with regard to the legality of executive action. To reclaim and restore constitutional norms requires a deeper common understanding of what those norms are and why the courts by structure and necessity will play only a limited role in sustaining them, even when they rise to constitutional obligations and violate constitutional rights.

I have had many occasions over the last three decades to consider the rule-of-law norms that govern presidential action, both as a lawyer and as an academic. Most directly relevant, I served during the Clinton Administration in the U.S. Department of Justice including as the acting head of OLC, which

25. *Id.*

26. Ryan Lizza, *Why Sally Yates Stood Up to Trump*, NEW YORKER (May 29, 2017), <https://www.newyorker.com/magazine/2017/05/29/why-sally-yates-stood-up-to-trump> [<https://perma.cc/S9R7-JFRN>].

27. About the Office, U.S. Dep’t Just.: Off. Legal Couns., <https://www.justice.gov/olc> [<https://perma.cc/82XG-GEJB>].

28. Lizza, *supra* note 26.

29. U.S. CONST. art. II, § 3.

30. *Trump*, 138 S. Ct. at 2424 (Kennedy, J., concurring).

is charged with advising the President and Executive Branch officials on matters of law.³¹ Paramount among its responsibilities, OLC provides the President (typically via the Counsel to the President) legal advice to help guide the fulfillment of constitutional responsibilities in conformity with all applicable laws, consistent with the Take Care Clause³² and the presidential oath of office.³³ OLC has a longstanding, nonpartisan tradition of giving accurate, untainted legal advice—of telling presidents “no” when the law so dictates and not allowing desired policy ends to drive legal analysis. If an answer is no, OLC helps develop lawful alternatives. Former heads of OLC during administrations of both parties describe the role of OLC and the Attorney General in this way.³⁴

OLC typically operates outside of public view, but the office came under close scrutiny and perhaps is best known for a period when it sharply deviated from traditional norms in advising on certain national security matters following the 9/11 terrorist attacks. This was revealed by the leaking of a classified OLC memorandum that included among its deeply flawed conclusions that the President as Commander in Chief had authority to act contrary to federal statutes that prohibited the use of torture.³⁵ Harvard law professor Jack Goldsmith has written about taking charge of OLC in 2003 and working to restore its traditions—and being told that he would have blood on his hands if he persisted.³⁶ James Comey, whom President Trump

31. I served first as a Deputy Assistant Attorney General (1993–1996) to Assistant Attorney General Walter Dellinger and later as the Acting Assistant Attorney General heading OLC (1997–1998).

32. U.S. CONST. art. II, § 3.

33. U.S. CONST. art. II, § 1, cl. 8 (“I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States.”).

34. See Dawn E. Johnsen, *Faithfully Executing the Laws: Internal Legal Constraints on Executive Power*, 54 UCLA L. REV. 1559, 1582 n.100 (2007) (quoting statements made during U.S. Senate confirmation hearings by Republican nominees to the Department of Justice: Alberto Gonzales, Timothy Flanigan, and Steven Bradbury).

35. Memorandum from Jay S. Bybee, Assistant Attorney Gen., Office of Legal Counsel, U.S. Dep’t of Justice, to Alberto R. Gonzales, Counsel to the President (Aug. 1, 2002), <https://www.justice.gov/olc/file/886061/download> [<https://perma.cc/GK9S-B2CW>]. After the OLC memorandum leaked, the Bush Administration disavowed it and OLC eventually issued a new memorandum to replace it. See Memorandum from Daniel Levin, Acting Assistant Attorney Gen., Office of Legal Counsel, U.S. Dep’t of Justice, to James B. Comey, Deputy Attorney Gen. (Dec. 30, 2004), <https://www.justice.gov/file/18791/download> [<https://perma.cc/LY4B-SJDE>] (stating that this memorandum supersedes the August 2002 memorandum).

36. See *Preserving the Rule of Law in the Fight Against Terrorism: Hearing Before the S. Comm. on the Judiciary*, 110th Cong. 29–32 (2007) (statement of Jack Landman Goldsmith, Henry L. Shattuck Professor of Law, Harvard Law School) (discussing his efforts to revive OLC’s traditional norms and practices in the face, for example, of David Addington’s warning that “the blood of 100,000 people who die in the next attack would be on [Goldsmith’s] hands” if he persisted); JACK GOLDSMITH, *THE TERROR PRESIDENCY* 10–12 (2007) (“I was astonished, and immensely worried, to discover that some of our most important counterterrorism policies rested on severely damaged legal foundations.”).

fired from his position as FBI Director, similarly has described pressures to twist legal analysis to match desired policy outcomes when he served as President Bush's Acting Attorney General.³⁷ In his first months in office, President Barack Obama took a series of actions that expressly rejected the Bush Administration's theory of unilateral and preclusive presidential war powers and otherwise aimed to restore rule-of-law norms.³⁸

The notorious leaked OLC advice with regard to torture prompted me to work with eighteen former OLC lawyers to detail the nonpartisan norms that traditionally have guided OLC's work. In 2004, we published ten "Principles to Guide the Office of Legal Counsel."³⁹ The third principle bears quotation here for its similarity to Justice Kennedy's later pronouncement in the context of the Travel Ban:

In formulating its best view of what the law requires, OLC always should be mindful that the President's legal obligations are not limited to those that are judicially enforceable. In some circumstances, OLC's advice will guide executive branch action that the courts are unlikely to review (for example, action unlikely to result in a justiciable case or controversy) or that the courts likely will review only under a standard of extreme deference (for example, some questions regarding war powers and national security). OLC's advice should reflect its best view of all applicable legal constraints, and not only legal constraints likely to lead to judicial invalidation of executive branch action. An OLC approach that instead would equate "lawful" with "likely to escape judicial condemnation" would ill serve the President's constitutional duty by failing to describe all legal constraints and by appearing to condone unlawful action as long as the President could, in a sense, get away with it. Indeed, the absence

37. See *Preserving Prosecutorial Independence: Is the Department of Justice Politicizing the Hiring and Firing of U.S. Attorneys?: Hearing Before the S. Comm. on the Judiciary*, 110th Cong. 213–40 (2007) (statement of James B. Comey, former Deputy Att'y Gen. of the United States) (describing inappropriate pressures from White House officials and threatened resignations in response from Department of Justice officials); JAMES COMEY, *A HIGHER LOYALTY* 74–115 (2018) (describing multiple instances of such pressures); *id.* at 86 ("[V]ice [P]resident [Cheney] looked at me gravely and said . . . '[t]housands of people are going to die because of what you are doing.'"); *id.* at 106 ("The United States Department of Justice had made serious legal mistakes in advising the president and his administration about surveillance and interrogation.").

38. See Press Release, Office of the Press Secretary, Remarks by the President on National Security (May 21, 2009), <https://obamawhitehouse.archives.gov/the-press-office/remarks-president-national-security-5-21-09> [<https://perma.cc/3Q4Q-43V4>] (announcing that because "these tactics were on . . . the wrong side of history," they must be left in the past—"where they belong"); Johnsen, *supra* note 3, at 150 (noting the Obama Administration's rejection of "extreme interrogation methods, black sites, and indefinite detention").

39. Johnsen, *supra* note 34, at 1578; see also Memorandum from David J. Barron, Acting Assistant Attorney Gen., Office of Legal Counsel, U.S. Dep't of Justice, to Attorneys of the Office of Legal Counsel, U.S. Dep't of Justice (July 16, 2010), <https://www.justice.gov/sites/default/files/olc/legacy/2010/08/26/olc-legal-advice-opinions.pdf> [<https://perma.cc/6KSU-LX2U>] (describing OLC best practices for opinions).

of a litigation threat signals special need for vigilance: In circumstances in which judicial oversight of executive branch action is unlikely, the President—and by extension OLC—has a special obligation to ensure compliance with the law, including respect for the rights of affected individuals and the constitutional allocation of powers.⁴⁰

President Trump's apparent disdain for this foundational norm—and penchant for instead inappropriately proceeding in terms of litigation risk, what he can “get away with,” to the extent he considers legal constraints—perhaps was best captured in his disingenuous announcement of a national emergency to justify building a border wall that Congress refused to fund.⁴¹ In a video clip that went viral, President Trump speculated in an unusual sing-song voice about his odds of prevailing in litigation that challenged his national emergency declaration, even while acknowledging “I didn’t need to do this”⁴²:

[T]hey will sue us in the Ninth Circuit even though it shouldn’t be there, and we will possibly get a bad ruling, and then we’ll get another bad ruling, and then we’ll end up in the Supreme Court and hopefully we’ll get a fair shake and we’ll win in the Supreme Court just like the Ban.⁴³

Notably, Justice Kennedy, whose concurrence called for Executive Branch vigilance in legal compliance, has been replaced by Justice Brett Kavanaugh.

Our constitutional democracy is built on often-unwritten but essential behaviors and expectations that protect what the world has shown can be fragile democracies. Respect for the rule of law. Respect for democratic processes. Respect for governmental institutions. Exercises in identifying those norms, as in the “Principles to Guide the Office of Legal Counsel,” should inform efforts to reclaim and restore the constitutional norms that

40. Johnsen, *supra* note 34, at 1605. Presidents dating back to George Washington have recognized their obligation to ensure the legality of their actions and have sought legal counsel from Executive Branch officials, famously including the question of the constitutionality of the First Bank of the United States. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819). President Washington, by way of his Secretary of State Thomas Jefferson, notably also sought assistance from the U.S. Supreme Court regarding the United States’ treaty obligations, which the Court declined to provide and instead referred the President to “the power given by the Constitution to the President, of calling on the heads of departments for opinions.” Letter from John Jay to George Washington (July 20, 1793), in 4 *THE FOUNDERS’ CONSTITUTION* 258 (Philip B. Kurland & Ralph Lerner eds., 1987).

41. Aaron Blake, *‘I Didn’t Need To Do This’: Trump Just Kneecapped His Case for a ‘National Emergency,’* WASH. POST (Feb. 15, 2019), <https://www.washingtonpost.com/politics/2019/02/15/i-didnt-need-do-this-trump-just-kneecapped-his-own-case-national-emergency/> [<https://perma.cc/JN6R-8BSC>].

42. *Id.*

43. Trump continued talking in this vein about the Travel Ban litigation; for full effect, it is best to watch the extended video of his remarks. PBS NewsHour, *WATCH: ‘We’ll End Up in the Supreme Court,’ Trump Predicts for Emergency Declaration*, YOUTUBE (Feb. 15, 2019), <https://www.youtube.com/watch?v=LYqkzWGWkiE> [<https://perma.cc/8XWY-33Q5>].

President Trump has undermined and that, in fact, he seems quite conspicuously to relish dismantling. Constitutional norms can be promoted, too, by the honoring and repeating of stories of individuals, Republican and Democratic officials, standing up for the rule of law. Acting Attorney General Sally Yates standing in opposition to President Trump's unconstitutional Travel Ban, at the price of her job. The dramatic race to the hospital (and later threatened resignations) by Acting Attorney General James Comey, head of OLC Jack Goldsmith, and FBI Director Robert Mueller, to prevent senior Bush White House officials from pressuring a very sick Attorney General John Ashcroft to overrule objections and authorize the continuation of unlawful counterterrorism surveillance.⁴⁴ We are reminded that it can require courageous actions of individuals and institutions to protect fundamental norms in the face of presidential threats. And that we must strive to elect presidents who will adhere to constitutional norms and use the powers of their office to secure those norms into the future.

44. COMEY, *supra* note 37, at 87–99.

